WONG MANN TUNG, RE

HIGH COURT, BRUNEI
DENYS ROBERTS CJ
[CRIMINAL MOTION NO. 9 OF 1987]
12 & 15 AUGUST 1987

CRIMINAL PROCEDURE: *Habeas corpus - Preventive detention order valid - Whether principles of natural justice applied - Whether grounds of detention are subject to judicial review.*

This was an application for *habeas corpus* made pursuant to s. 341, Criminal Procedure Code. The applicant was taken into custody by the police for about a year under the Public Order Act. The applicant was kept in police custody by a series of warrants of arrest each lasting 14 days. Subsequently, an order of detention was made by the Minister against him for a period of twelve months pursuant to s. 2(1)(a), Criminal Law (Preventive Detention) Act. It was extended for a further period of twelve months pursuant to s. 9(1) of the said Act. The grounds for the application were that the Minister who made the order did not have any grounds to believe that he should be detained; the Minister did not act in good faith as the order of detention was made to validate the earlier detention by the police which was unlawful; a copy of the detention order was not served on the applicant; the applicant did not have an opportunity to state his case to the advisory committee under s. 3, Criminal Law (Preventive Detention) Act; s. 3 of the Act had not been compliled with; the extension order was invalid as it wrongly referred to s. 9 of the Act; the applicant was not given an opportunity to be heard by the Minister under common law.

Held:

[1] There was no evidence to show that the order of detention made by the Minister was made to validate the earlier detention by the police. As there was no evidence of *mala fides,* the Court, could not review the subjective satisfaction of the Minister.

[2] Although the applicant was not served with a copy of the detention order, he was not prejudiced as it had been served on his lawyer.

[3] There was no evidence to show that the advisory committee had failed to consider the grounds of the detention and to report to the rule, as required by s. 3, Criminal Law (Preventive Detention) Act.

[4] Although there was a mistake in the extension order in reference to s. 9, Criminal Law (Preventive Detention) Act, that did not invalidate the order.

[5] There was no provision in the Criminal Law (Preventive Detention) Act for the right to be heard by the applicant. The principles of natural justice did not apply.

Cases referred to:

Liversidge v. Anderson [1941] 2 All ER 338
Greene v. Secretary of State for Home Affairs [1941] 3 All ER 388
Yeap Hock Seng v. Minister for Home Affairs, Malaysia [1975] MLJ 278
Athappen a/l Arumugam v. Menteri Hal Ehwal Dalam Negeri Malaysia [1984] 1 MLJ 67

Legislation referred to:

Constitution of Brunei Darussalam [Brunei], s. 83(3)
Criminal Law (Preventive Detention) Act [Brunei], ss. 2, (1)(a), 3, (1), 9, (1)
Criminal Procedure Code [Brunei], s. 341

Emergency (Public Order and Prevention of Crime) Ordinance 1969 s. 4(1)
Interpretation & General Clauses Act (Cap 4) [Brunei], s. 17

For the public prosecutor - Magdelene Chong; Attorney General's Chambers
For the applicant - Raymond Szetu; M/s. Szetu & Co.

JUDGMENT

Denys Roberts CJ:

Preliminary

Wong Mann Tung ("the applicant") seeks an order, which is in the nature of a *habeas corpus*, under s. 341 of the Criminal Procedure Code, directing the officer-in-charge of the Detention Centre, Jerudong to set the applicant at liberty, on the ground that the applicant is illegally detained in public custody within Brunei Darussalam.

The application is supported by two affidavits, one sworn by his sister Wong Wen Foon 23 July 1987 and the other by his solicitor on 10 August 1987.

Background

The following facts can be derived from the affidavits, from documents produced and from the submissions of Counsel.

The applicant was taken into custody by the police about the end of April, 1985 and was detained in Panaga Police Station until March 1986.

About 25 March 1986, however, he was transferred to Jerudong prison from which, shortly afterwards, he was transferred to the Detention Centre at Herudong on the authority of an Order of Detention ("the Order") issued by the Minister of Law under s. 2(1)(a) of the Criminal Law (Preventive Detention) Act (Cap. 150) ("the Act").

The relevant parts of the Order are follows:

> **Whereas,** I Pengiran Laila Kanun Di-Raja Pengiran Haji Abbas, Minister of Law, am satisfied that the undermentioned person has been associated with activities of a criminal nature and that it is necessary that the undermentioned person be detained in the interest of public safety, peace and good order;
>
> **Now, therefore,** in exercise of the powers conferred on me by s. 2 (1)(a) of the Criminal Law (Preventive Detention) Act, I do hereby **Order and Direct** that the undermentioned person be forthwith detained for a period of **Twelve Months in The Place of Detention Jurudong** or in such other place as I may from time to time direct and I do hereby **Order and Direct** you the said Officer to receive the undermentioned person forthwith into your custody together with this order, and him safety to keep in detention for a period of **Twelve Months** unless and until this Order be extended, varied, cancelled, suspended or revoked.
>
> **Name of Detainee**
>
> **Wong Mann Tung**
> NRIC: (Brunei) 097848 (Purple)
>
> **Given** under my hand this 11 March 1986.
>
> (Sdg.) **Minister of Law**
> **Brunei Darussalam**

The procedure to be followed after the making of an Order under s. 2 of the Act is set out in s. 3 thereof -

> 3(1) Every order made by the Minister under s. 2 of this Act shall, together with a written statement of the grounds upon which the Minister made the order, be referred by the Minister to advisory committee constituted as provided in s. 10 of this Act, within 28 days of the making of such order.
>
> (2) The advisory committee shall submit to His Majesty the Sultan and Yang Di-Pertuan a written report on the making of such order and may make therein such recommendations as it shall think fit.
>
> (3) His Majesty shall consider such report and may cancel or confirm such order and in confirming such order may make thereto such variations as he hinks fit.

By virtue of s. 2(1)(a) of the Act an order of detention made under that section is valid for a maximum period of one year. Thereafter, however, by s. 9(1)

> His Majesty may from time to time extend the validity of any order of detention confirmed under the provisions of subsection (2) of s. 3 for periods not exceeding any year at any one time ...

In exercise of the power conferred by s. 9, His Majesty extended the validity of the Order for a further year. The important passage of the Extension Order reads -

> **Now, therefore,** in exercise of the powers conferred by s. 9(1) of the **Criminal Law (Preventive Detention) Act** and all other powers hereunto enabling His Majesty the Sultan and Yang Di-Pertuan of Brunei Darussalam hereby **Orders and Directs** that the period of the above mentioned Order of Detention with respect to the undermentioned person be extended for a further period of **Twelve Months** and His Majesty the Sultan and Yang Di-Pertuan hereby **Orders and Directs** you to receive the undermentioned person forthwith into your custody together with this Order, and him safely to keep in detention for a period of **Twelve Months in The Place of Detention Jerudong** unless and until this Order be extended, varied, cancelled, suspended or revoked.
>
> **Name of Detainee**
>
> **Wong Mann Tung**
>
> NRIC: (Brunei) 097848 (Purple)
>
> **Given** under my hand this 11March 1987.
>
> **By Command**
>
> (Sgd.) **Pengiran Bahrin**
> **(Pengiran Laila Kanun Di-Raja)**
> **Minister of Law**
> **Brunei Darussalam**

It is not in dispute that by virtue of s. 17 of the Interpretation and General Clause Act (Cap. 4) where any written law confers power on His Majesty it shall be sufficient if his exercise of it is signified under the hand of a Minister, in the manner adopted in this instance.

Validity of the Act

The applicant submits that his continuing detention is illegal and not authorized by law, for a variety of reasons, which I will consider in turn.

Before doing so, however, I note that Counsel for the applicant conceded that he did **not** seek to impugn the validity of the Act itself. This was passed in 1984, by virtue of powers conferrd by s. 83(3) of the Constitution of Brunei Darussalam on His Majesty to make "any order whatsoever which he considers desirable in the public interest", during the continuance in force of aproclamation of Emergency. It is not in issue that such a proclamation was in force when the Act (originally described as an Order) was made and still continues to be in force.

Failure of Minister to satisfy himself

One of the principal submissions advanced by the applicant was that the Order was illegal because the Minister did not discharge his duty to be satisfied -

(a) that the detainee has been associated with criminal activities of a criminal nature; and

(b) that it is necessary that the detainee be detained in the interest of public safety, peace and good order.

The Minister, in the Order, has, in terms, stated that he was so satisfied in both respects. The applicant argues that it is nevertheless open to a Court, and indeed its duty, to enquire as to the grounds on which the Minister was satisfied, in order to establish that he reached his conclusion in good faith and on the basis of sufficient evidence.

The weight of authority is, in my view, firmly against such a proposition. The leading English case is a *Liverisdge v. Anderson* [1941] 3 All ER 338 in which the appellant, detained under emergency regulations, claimed a declaration that his detention was unlawful.

The relevant regulation empowered the Secretary of State to order the detention of a person if "he has reasonable cause to believe a person to be of hostile origin or associations ...."

All members of the House of Lords (save Lord Atkin) were of the opinion that a Court could not enquire as to whether the Secretary of State did have reasonable cause to so believe.

As Lord Macmillan observed at p. 367, "a court of law manifestly could not pronounce upon the reasonableness of the Secretary of State's belief unless it were able to place itself in the position of the Secretary of State and were put in possession of all the knowledge, both facts and policy which he had. However, the public interest must, by the nature of things frequently preclude the Secretary of State from disclosing to a Court of anyone else the facts and reasons which have activated him."

Lord Wright at p. 377 commented "The Minister must be reasonably satisfied before he acts. Nevertheless, it is still his decision, and not the decision of anyone else."

In *Greene v. Secretary of State for Home Affairs* [1941] 3 All ER 388 the House of Lords decided that, where a person was detained under emergency regulations, an affidavit by the Home Secretary, stating his belief in the reason for the detention, was sufficient and that it was not necessary for him to state his grounds for such belief.

These and many other cases were carefully examined by Abdoolcader J in *Yeap Hock Seng v. Minister for Home Affairs, Malaysia* [1975] MLJ 278. The appellant had been detained under an order of detention made by the Minister under s. 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969.

The Order recited that the Minister was satisfied that it was necessary to make an order in respect of the applicant for the purpose of preventing him from acting in a manner prejudicial to public order. The Judge commented that " it is, of course, settled law that the subjective

determination of the Minister is not justicable ..." "The Court cannot be invited to undertake an investigation into the sufficiency of the matters upon which the satisfaction of the Minister purports to be granted."

The A*thappen a/l Arumugam v. Menteri Hal Ehwal Dalam Negeri Malaysia* [1984] 1 MLJ 67 Edgar Joseph J dismissed an application for judicial review of an order of detention issued under the emergency (Public Order and Prevention of Crime) Ordinance 1969, concluding that the subjective satisfaction of the Minister to detain a subject is not open to review. With this conclusion I agree.

Edgar Joseph J however, comments that, exceptionally a court may review an order for preventive detention if (*inter alia*) *malafides* is alleged. It was in this application suggested that *malafides* could be inferred from the history of the applicant's detention.

His detention between 4 April 1985 and March 1986 is said to have been authorized in accordance with the provision of the Public Order Act (Cap. 148).

Section 18 of that Act empowers the officer commanding a Police District in a special area to detain a suspected person for up to 16 days. It appears as if the applicant's continued detention beyond such period was achieved by a series of warrants each lasting 14 days; as each such period expired, the applicant was released and immediately re-arrested.

Such detention appears to me, without having had the benefit of full argument on this point, to be going beyond the proper object and scope of Cap. 148, though the applicant conceded that the Order, if itself valid, had restored legality to the applicant's detention from 11 March 1986. The alleged impropriety of the applicant's detention under Cap. 148 is thus only relevant to this application because it has been suggested that the Minister was not acting in good faith in declaring himself satisfied under s. 2 (1) of the Act.

The Minister, it was argued, many have been improperly influenced by a desire to validate an illegal detention. If so, his decision to make the Order was induced by improper considerations which would, in law, amount to *mala fides.*

There is no evidence to suggest that this was so and no ground on which I could properly decide that, when the Minister declared himself satisfied that it was necessary to detain the applicant, for the reasons set out in the Order, he was in reality doing so, wholly or partly, for reasons not stated therein.

I am therefore satisfied that a Court may not seek to go behind the Minister's subjective conclusion that he was satisfied of these matters which are a precondition to the making a detention order.

Procedural defects

The applicant argued that the Order is invalid because the procedural provisions of the Act were not followed in various respects -

(a) that a copy of the order was not not served on the detainee;

(b) that the detainee had no opportunity to state his case to the Advisory Committee under s. 3 (1) of the Act.;

(c) that the provisions of s. 3 of the Act were not complied with;

(d) that the extension order of 11 March 1987 is invalid by reason of a wrong reference in s. 9.

No affidavit in reply was filed on behalf of the Minister of Law, which is, I think, usual in cases of this nature, so that I am left without direct rebuttal of some of the plaintiff's obligations.

So far as the service of the order is concerned, a copy was provided to his solicitor, apparently shortly after it was issued, since, by a letter dated 17 April 1986, his solicitor refers to the detention of the applicant under s. 2 (1) of the Act. Therefore, even if the detainee himself was not provided with a copy of the order when he was detained under it, as is desirable, it does not appear as if he could have been prejudiced thereby.

There is no evidence to support the suggestion that there was a failure to follow s. 3 of the Act, which requires an advisory committee to consider the Minister's grounds for making an Order and to report to His Majesty thereon.

I see no substance in the argument that s. 9(1) of the Act does not empower his Majesty to extend an Order, because the subsection refers to an Order, "confirmed under subsection (2) of s. 3." This is clearly a mistaken cross reference and should read "subsection (3) of s. 3", which is the sub-section under which Orders are confirmed. The intention of s. 9(1) is clear and I so construe it.

The applicant did not attack the validity of the Extension Order made under s. 9(1) of the Act, save to the extent that he argued that it must fall if the Order falls, a contention I accept.

Unfairness

An alternative argument advanced by the applicant was that the manner of his detention was illegal because it infringes the principles of natural justice or (to use the more favoured concurrent idiom) because the Minister failed to observe the duty to act fairly, which modern cases have established as applying in many situations in which a Minister or Tribunal or other person must exercise a discretion, reach a decision or perform a statutory function.

In particular, it was suggested that -

(a) no grounds for his detention were furnished.

(b) the detainee was given no opportunity to be heard by the Minister before or soon after his detention;

The Criminal Law (Preventive Detention) Act (Cap. 150) follows very closely the wording of the Singapore Criminal Law (Temporary Provisions) Act.

In neither Act is there any requirement that the detainee should be furnished with notice of the "grounds" on which he was detained, if by grounds is meant a summary of the evidence on which the Minister acted when deciding whether to make an order under s. 2(1).

Nor is there any provision for the detainee to make representations to the Minister, the advisory committee or His Majesty.

While the Minister's action, therefore, is subject to review, this is not at the instance of the detainee but by virtue of s. 3 of the Act.

The applicant asks me to say that there is a general duty, imposed by common law, on the Minister to act fairly, by giving the detainee an opportunity to make representations of the kind mentioned earlier.

Whatever the position may be in relation to ordinary administrative or *quasi judical* acts performed by a public official, Counsel could refer to me to no authority which obliges a Minister, when acting in accordance with emergency powers conferred with the object of safeguarding public safety (as these are) to do more more than the emergency provisions themselves require.

The applicant complains that the effect of the Act is arbitrary and that the Minister had a duty to conduct himself fairly towards the applicant as a matter of general principle even if this is not required by the Act.

An Act which provides for detention without a prior trial necessarily involves an erosion of the traditional expectation of a subject that he will only be detained in a court so orders.

But any country which fears for its internal security and order is likely to enact such legislation when necessary. Cap. 150, which was enacted during a period of emergency, provides for procedures to be followed which provide any abuse of power by the Minister.

But I do not regard it as part of the function of a Court to import into such an Act obligations and proceedings which the legislative authority has not seen fit to include in it.

In the result of the application, for an order that a direction should issue under s. 341 of the Criminal Procedure Code, must fail.

Also found at [1988] 1 CLJ 878

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